No. 12950.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH UMBERLAND MINING COMPANY, a Corporation,
Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
Appellee.

APPELLEE'S REPLY BRIEF.

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Preliminary Statement.

Appellee, Standard Accident Insurance Company (hereinafter called "Standard"), brought an action in the District Court of the United States, Southern District of California, to have it declared that Home Indemnity Company of New York (hereinafter referred to as "Home") was obligated to defend one George White in two actions brought against said White in the Superior Court of San Diego County to recover from said White damages for alleged wrongful death. They were alleged to have resulted from White's operation of an automobile owned by North Umberland Mining Company (hereinafter called "North Umberland") with its consent. The District Court held that the obligation to defend White rested with Home. Home appealed to this Honorable Court which

held that White had breached the co-operation clause of the Home policy and that Home was not required to defend White in said Superior Court action. This decision is reported in 167 F. 2d 919.

Judgments were entered against White and North Umberland, by stipulation. Standard did not join in these stipulations. [R. 50-51.] The judgments were paid by Home on behalf of and for its assured [R. 52, 65] North Umberland. Thereafter North Umberland filed a complaint in intervention in this case, praying that it be declared that Standard is obligated to White under its policy of insurance issued to White in the amount of the judgment which "North Umberland had paid."

The District Court, Honorable James M. Carter, Judge, found contrary to this contention and entered judgment to the effect that North Umberland has a right to recover from White, but that Standard, under its policy, is neither obligated to White nor to North Umberland.

This appeal followed.

Jurisdiction of the United States District Court.

The District Court had jurisdiction of the original action by reason of the diversity of citizenship of the original plaintiff and defendant, the one being a citizen of Michigan, the other a citizen of New York, and by reason of the fact that the controversy exceeded the sum of three thousand dollars. It had jurisdiction of the controversy between intervener North Umberland and Standard because those parties, likewise, are citizens of different states, to wit, of Nevada and Michigan, respectively, and their controversy exceeds three thousand dollars. [See R. pp. 3, 4, 9, Sections 1332 and 2201 of Title 28, United States Code.]

Jurisdiction of the Court of Appeals.

This Honorable Court is empowered to review the case under Title 28, Section 225, United States Code.

Statement of Facts.

The facts of the case are not in dispute and are, for the greater part, contained in the opinion reported in 167 F. 2d 919. The following statement may serve as a summary of that opinion and of pertinent portions of the present record on appeal.

Standard, on September 29, 1945, issued its policy of insurance to George White, insuring a 1942 Packard automobile belonging to White. [R. 55.] It provided, among other things, for coverage of other automobiles which White might drive, as follows:

> "VIII. Temporary Use of Substitute Automobile . . . While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner." [R. 56.]

The policy likewise provided as follows:

> ". . . If the insured has other insurance against a loss covered by this policy the company shall not

be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements VII and VIII shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements." [R. 57.]

On July 20, 1946, White's Packard was temporarily out of use by reason of repairs. On that day North Umberland permitted White to drive a Lincoln automobile belonging to North Umberland. At the time North Umberland had a policy of insurance with Home, issued November 30, 1945. This policy insured and named as the vehicle it covered the Lincoln Zephyr automobile which White was driving with the consent of North Umberland at the time of the accident [R. 59], this policy contained the provision that it insured

"any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is within the permission of the named insured." [R. 60.]

While driving this Lincoln Zephyr, White had an accident by reason of which he was sued in the Superior Court of San Diego County, as previously stated. The

acts of White subsequent to the accident as far as it concerns co-operation with Home is described in the opinion in 167 F. 2d 919, and will not be detailed here. Suffice it to say that his conduct after the happening of the accident was such that Home in the decision reported in 167 F. 2d 919, was excused from defending White by reason of the latter's lack of co-operation with Home in the defense of the San Diego actions. While that appeal was pending, intervenor, North Umberland, and plaintiffs in the San Diego actions stipulated for judgment in favor of said plaintiffs and against White in the aggregate of eight thousand seven hundred and fifty dollars ($8,750.00). This judgment was thereafter satisfied as already indicated.

Standard did not participate in the San Diego proceedings at any stage or in any manner.

North Umberland now claims that by reason of satisfying said judgment it has acquired whatever rights White had against Standard under White's policy with Standard [R. 55], and, moreover, contends that under said policy Standard is now obligated to repay to North Umberland the money paid, with interest these judgments to which White and North Umberland had stipulated.

Summary of Pleadings.

The contentions just stated are elaborated in the complaint in intervention of North Umberland [R. 3-9] in which it is alleged that two actions were brought in San Diego County against White and North Umberland, that judgments were entered against White and North Umberland in these actions in the total sum of eight thousand seven hundred fifty dollars ($8,750.00), that Standard is liable to White under its policy of insurance and that North Umberland, having paid for and on behalf of White, is entitled to recover the amount it paid from Standard.

The answer admits all facts pleaded in the complaint but denies that under its policy, or otherwise, it owes any money whatsoever to White or to North Umberland. [R. 9-13.]

Findings of Fact and Conclusions of Law followed [R. 24-34], which state, in greater detail than we have done here, the undisputed facts leading to this controversy. The decisive finding is par. XVII, which reads as follows:

> "The court finds that the rights and liabilities of defendant George White, defendant Home Indemnity Company of New York, and plaintiff Standard Accident Insurance Company of Detroit, became and were fixed not later than the time of the accident above referred to; that at the time of said accident George White had other valid and collectible and available insurance within the meaning of the provisions of the policy issued to him by Standard Accident Insurance Company of New York, namely, the insurance provided for and afforded to him by the policy issued to the intervener, North Umberland Mining Company, by defendant Home Indemnity Company of New York; that the subsequent breach of the provisions

and conditions of the policy of insurance of Home Indemnity Company of New York by the defendant George White did not alter or change the rights or liabilities of the plaintiff, Standard Accident Insurance Company of Detroit, as the excess carrier; that the insurance afforded by the policy of plaintiff, Standard Accident Insurance Company of Detroit, was and now is solely excess insurance over and above a sum equal to the limits of the insurance afforded to the defendant George White by the policy of Home Indemnity Company of New York, and which latter insurance was (30) valid and collectible and available to George White at the time of said accident." [R. 32.]

Based on these Findings the Court concluded [R. 33] that White was obligated to North Umberland, but that Standard was not obligated to anyone under its policy.

Summary of Proceedings Subsequent to Entry of Judgment.

Inasmuch as we believe that this appeal was not instituted in time, it will be necessary to summarize briefly proceedings taken in the District Court after judgment. Judgment herein was filed January 25, 1951. [R. 36.]

On March 20, 1951, appellant made an *ex parte* application for an extension of time to file notice of appeal. The application was based on an affidavit of appellant's attorney. [R. 36-37.] This affidavit assigned as a ground that appellant's attorney "was not aware of the entry of said judgment and did not receive notice of such entry."

[R. 37.] On this *ex parte* application an order was made on March 20 extending the time for appeal to March 26 [R. 37], and the notice of appeal thereupon was filed on March 22. [R. 46.]

Standard, upon receiving the notice of appeal made a motion [R. 38-39] to strike the order of March 20, on the ground that the records of the District Court, including the civil docket, show that notice of entry of judgment had been sent to North Umberland and that, on the other hand, notice of the application for extension of time was not given to Standard and that an *ex parte* application for extension of time to file a notice of appeal under these circumstances and after the original time for appeal had expired was null and void. This motion [R. 38-39] was accompanied by an affidavit of Standard's attorney, Everett W. Thompson [R. 42-45] pointing out that the docket shows the sending of this notice to all attorneys, that the proceedings extending the time to file the notice of appeal were not taken on motion as required by Rule 6(b) of the Rules of Civil Procedure and that the grounds stated in the affidavit were not sufficient to grant such an extension. The allegations of this affidavit were not controverted.

After argument to the District Court the minute order of April 23 [R. 47] resulted, which declined to rule on the motion because if the order was a voidable one, the appeal robbed the Court of jurisdiction to do anything further; if, however, it was a void one, no action to set it aside was necessary.

Questions Presented.

I. Is the *ex parte* order of March 20, 1951, a proper exercise of the powers of the District Court, and did it validly extend North Umberland's time to appeal, or is said order void and of no effect?

II. Was the District Court correct in deciding that the protection which White undoubtedly had at the time he stepped into North Umberland's Lincoln Zephyr automobile with North Umberland's permission, and at the time of the accident "valid and collectible insurance available to the insured," as this term is used in the policy of Standard?

III. Was the District Court right in holding that Standard was not obligated to appellant or White in any sum under its policy of insurance with White, and that the insurance provided in its policy never became primary insurance?

Summary of Argument.

1. North Umberland, by reason of its payment of the judgment against White asserts certain rights against Standard under White's policy with Standard. These rights cannot be any greater than White's rights against Standard and North Umberland is in exactly the same position toward Standard as White would be.

2. At the moment of the accident, the rights of White under his policy with Standard became fixed and crystallized.

3. White's failure to co-operate with Home subsequent to the accident could not convert the "valid and collectible" insurance afforded to White under the Home policy at the moment the accident by voluntary acts of his into invalid and uncollectible insurance, and thereby affect the right of Standard.

I.

North Umberland, Seeking to Avail Itself of White's Alleged Rights Against Standard Can Be in No Better Position Than White Himself.

The proposition stated in the heading is the self-evident starting point for the entire argument on this appeal. We submit there is no need to belabor it and the following list of authorities establishing this general proposition will suffice:

Firemen's Fund etc. v. Kennedy, 97 F. 2d 882 (9th Cir.);

Fageol Truck v. Pacific Indemnity, 18 Cal. 2d 731, 117 P. 2d 669;

Royal Indemnity Co. v. Evatson, 61 F. 2d 614.

II.

At the Moment of the Accident, the Rights of White Under His Policy With Standard Became Fixed and Crystallized.

The important difference between Standard's and North Umberland's position is this: North Umberland maintains that what is "valid and collectible insurance available to the insured" under the terms of the Standard policy did not become determinable at the moment when the accident happened, but that we had to wait and see whether White would not do something after the accident to defeat the obligation Home had to White at the moment of the accident. Standard contends that it is not within the power of White to change by voluntary acts after the accident the nature of the obligation of Standard toward him, that is, in other words, that White does not have the power by his own voluntary and, we may add,

wrongful act, to change what was clearly excess insurance under the Standard policy at the moment of the accident into primary insurance.

As the quotations from and references to the Standard policy have shown, it covers one specific automobile, to wit, a Packard. It does not generally cover any other. Under certain specific and well-defined conditions some type of protection is extended to White if he drives another automobile than the Packard. Those conditions are that if the Packard is laid up for repairs, any substitute automobile will also be covered. That extension is, however, not all-inclusive. The substitute automobile is covered only with a particular type of insurance depending on whether or not the use of the substitute automobile (here the Lincoln Zephyr) is protected by other insurance covering permissive use by White. If there is no other valid and collectible insurance, then Standard's protection to White while driving an automobile other than the Packard is primary insurance; if the use of an automobile other than the Packard while driven by White is covered by other valid and collectible insurance, Standard's protection becomes excess insurance.

In this case the judgment amounted to eight thousand seven hundred fifty dollars ($8,750.00); the Home policy was in a face amount in excess of this sum. If, then, the Home policy was valid and collectible, the Standard protection was excess insurance, which came into play only in the event the "valid and collectible" insurance was first exhausted.

The pivotal questions are:

A. What is meant by "other valid and collectible insurance available to the insured?"

B. At what moment do we determine whether other insurance is "valid and collectible," and "available to the insured"?

A. What Is "Other Valid and Collectible Insurance Available to the Insured?"

Appellant in its argument makes a fundamentally erroneous assumption as to the meaning of "valid and collectible." It argues that insurance did not become valid and collectible under its policy until White had fully cooperated with Home in the defense of the lawsuit, and that since he did not do that, the insurance never became valid and collectible.

We submit that this argument does not even have a superficial plausibility. Unless, for reasons deriving from the general law of contract, no meeting of the minds is present or no other reason which makes contracts void generally, this contract of insurance was "valid" the moment the Home policy was issued, to wit, on November 30, 1945; whereas the accident did not happen until June 20, 1946. From December 2, 1945, Home at all times had an obligation to assume certain duties of defense and payment in respect to all accidents which were covered under the terms and provisions of its policy. On that day the insurance became valid. It follows that at the moment White stepped into the Lincoln Zephyr automobile and at the moment the accident happened there was other valid insurance covering White's driving on that particular day. We do not believe that much citation of authorities is necessary for so elementary a proposition. But, see a

general discussion in 29 Am. Jur., Insurance, par. 219, *et seq.*

Did White's acts subsequent to the happening of the accident render the policy invalid? The answer is, we submit, a plain "No." It is on the assumption that the terms of the policy which Home invokes were valid that it now seeks to be excused from payment. The co-operation clause is not a condition subsequent that makes the policy invalid, but it is a condition precedent, as the policy itself plainly states, and this court has announced, to the institution of *an action* to collect on the policy. We quote, just as North Umberland has quoted, the pertinent provision from the Home policy.

> "no action shall lie against the company unless as a condition precedent thereto (this clearly means precedent to the bringing of an action) the insured shall have fully complied with all of the terms of this policy nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company." [Tr. p. 61.]

The Home policy of insurance therefore was clearly and indisputably a valid contract of insurance. The breach of the co-operation clause did not wipe out the policy, nor make it invalid. The parties even now judge their position and their respective obligations by its terms. To illustrate further that the Home policy was valid, and to show beyond peradventure that the time of the accident is the time when the rights of the parties become fixed, let us look at some cases deciding the position of a man like White between two insurers like Standard and Home, where he co-operates after the accident. In other

words, let us see what the authorities indicate would have been the result here if White had not breached the co-operation clause in the Home policy.

This question was under consideration in *Travelers Indemnity Company v. State Auto Insurance Company,* 66 Ohio App. 457, 37 N. E. 2d 198. In analyzing that opinion we shall refer to the companies as "Travelers" and "State" respectively. State issued to the father, owner of an Oldsmobile, its policy containing generally the same provisions as to the matters here in dispute as the Home policy. Thus it provided in substance that if the owner of the Oldsmobile gave consent to another to drive the Oldsmobile, the insurance extended to such driver. Travelers had issued a policy to the son covering a Packard. This Travelers policy to the son had a clause to the effect that if the son drove a car other than the Packard and such other car was covered by insurance, then the Travelers policy should be "excess insurance over any other valid and collectible insurance available to the insured." The son operated the father's Oldsmobile and had an accident. State, similar to Home in our case, contended it was not liable, claiming that the Travelers policy covered the accident and that the exclusion in its policy in the event of other valid insurance would apply. Travelers did not accede to that contention, refused to defend the son and denied any liability except for amounts in excess of the limit of the State policy. It was decided in the lower court that the State policy was primary insurance and the Travelers policy was excess insurance, and the Court found it quite apparent that Travelers was not liable except for amounts over and in excess of the limits of the State policy. Since the claim of the injured person did not exceed the limits of the State policy the excess insurance of Travelers, it was held, *never came into play.*

This case clearly shows that the liability of the parties is to be determined as of the moment of the accident. Applied to our case this means that at the moment of the accident, the insurance provided by Standard was excess insurance, whereas that provided under the Home policy to White was primary insurance. Consequently, it could *never come into play* until and unless the judgment against White was over and in excess of the Home policy limits.

A similar situation was discussed in *State Farm Mutual Auto Insurance Company v. Hall,* 292 Ky. 22, 165 S. W. 2d 838. In this case one Hall and one Chancellor went on a trip in Chancellor's car which Hall drove with Chancellor's permission. Hall had a policy with State Farm Mutual similar to the Standard policy and Chancellor had one with another insurance company similar to the Home policy. An accident occurred as a result of which a judgment was recovered against Hall in the sum of $2,500.00. Chancellor's policy, which had a limit of $5,000, and was therefore ample to cover the judgment, had to be resorted to first and Hall's policy was considered to provide only insurance by way of excess coverage over Chancellor's policy. The wording of Hall's policy in this respect is identical with ours (see 165 S. W. 2d at p. 839, 2nd col.). The Court stated on page 840:

> "Under a policy similar to Mutual's," (insurer of Hall and therefore occupying the same position as Standard in our case) "and under facts quite like those appearing in this record, courts of other jurisdictions have upheld the plea that an insurer occupying Mutual's position in the instant case is only liable for excess insurance."

To the same effect, see *Trinity Universal Insurance Company v. General Accident etc. Corporation,* 138 Ohio St. 488, 35 N. E. 2d 836.

In these cases the date of the accident is assumed, as a matter of course, as the point of time which determines the respective rights and obligations of the insurers and whether their coverage is primary or excess coverage. Under the cases cited later under this point, particularly under *Air Transport v. Employers,* 91 Cal. App. 2d 129 at 131, and *Maryland Casualty Company v. Hubbard,* 22 Fed. Supp. 697, express mention is made that the point of time which fixes the liability of respective insurers *is the moment when the accident happens.* This means that White, at the moment the accident happened, had valid primary insurance with Home, and from that moment on nothing but his own failure to cooperate could defeat this primary right.

B. Was the Insurance Collectible?

As we have seen, the first of the twin conditions of "valid and collectible" was clearly present. What about the other, namely, "collectible"? Was this insurance collectible?

Stated in the most common language, the term "collectible" in this instance certainly means that Standard said to White, "If when you drive an automobile other than the Packard, there is insurance on this other automobile which you can collect we cover you only by way of excess insurance over that collectible insurance." Would it be fair and proper to say that it was within the power of White by his own wrongful act to forfeit his right to "collect" insurance "available to him" and by such wrong-

ful act change what was a collectible item into an uncollectible one?

There can be no doubt that North Umberland stands before Standard in White's shoes. Suppose White had paid this judgment out of his own pocket, could he now prevail against Standard by maintaining that the terms of the Standard policy placed the right and power *in his hands* to change what was clearly collectible at the moment of the accident into something uncollectible and then come to Standard and say, "It is true, I could have collected on the Home policy; in fact at the moment of the accident I did have rights under the Home policy, but I decided to forego or forfeit those rights and throw the burden of the loss back on you?" Every sense of propriety and justice gasps at such a proposition.

It is for that reason, if for no others, that the rule of law wisely provides that *the rights of the parties under policies of insurance become fixed at the moment of the accident.* That certainly is the general rule and was so declared in *Air Transport v. Employers etc.*, 91 Cal. App. 2d 129 at 131, 204 P. 2d 647. The reasoning and logic of this case is applicable to the case at bar. It is true the question in that decision was not between primary and excess insurance but between concurrent and pro rata insurance, but the underlying considerations are the same. In that case the Court said on page 131:

> "To determine the liability of Employers at this time, if any, we must first determine the respective liabilities, if any, of Employers and Pacific Indemnity *at the date of the accident.*" (Emphasis ours.)

If we substitute Home and Standard for Employers and Pacific Indemnity, and primary and excess in place of concurrent and pro rata insurance in the case just cited,

it follows logically and naturally that the obligation of the parties in this case are fixed as of the time of the accident and remain fixed as far as these parties are concerned, even though White wrongfully chose to vitiate by his own wrongful act the protection he had under the Home policy to start with. Other cases and authorities to the same effect are:

Zurich v. Clamor, 124 F. 2d 717; [16]

Gutner v. Switzerland, 32 F. 2d 700;

Air Transport v. Employers, etc., 91 Cal. App. 2d 129, at 131, 204 P. 2d 647;

Gillies v. Michigan Millers, etc. Ins. Co. (Aug. 18, 1950), 98 A. C. A. 959, at 957;

Maryland Casualty Co. v. Hubbard, 22 Fed. Supp. 697 (1938, U. S. D. C., Judge Yankwich);

Lehigh Valley, etc. v. Providence, etc., 127 Fed. 364;

Couch on Insurance, Vol. 5, p. 3636, note 12.

III.

Was the District Court Right in Holding That Standard Was Not Obligated to George White in Any Sum Under Its Policy of Insurance With White, and That the Insurance Provided in Its Policy Never Became Primary Insurance?

In the light of the considerations just expressed in point II, the District Court was bound to hold, *first,* that at the time of the accident White's protection under the Home policy was "valid and collectible" and "available to him" and therefore constituted "other valid and collectible insurance available to the insured"; that it remained such except for the wrongful acts of White, but that such wrongful acts

could not alter the situation of the parties which became fixed on the date of the accident.

Consequently, North Umberland has a claim to be reimbursed by White (under Section 402 of the California Vehicle Code), but since White has no claim against Standard, North Umberland likewise cannot recover from Standard.

IV.

Reply to the Argument of North Umberland.

North Umberland argues (App. Br. p. 12) that at the time of the happening of the accident there were two conditions precedent which first had to be met before this policy became collectible. It cannot cite any authority in support of this statement although it refers to the former opinion in 167 F. 2d 919. This case held no more than that White had failed to co-operate and that, therefore, Home did not have to provide him with a defense. It made no finding on the validity or invalidity of the policy. On the contrary, it had to consider the policy as a valid and existing contract in order to reach the result it did.

Indirectly, North Umberland maintains that the time of the accident is not a proper time to fix the rights of the parties in this case because at that time the amount of the recovery was not ascertained, nor was it certain at that time whether White would co-operate or not. But again, these are conditions to the institution of an action to re-

cover amounts paid by the insured, and not conditions which invalidate the policy.

The only other argument North Umberland makes is to the effect that the interpretation of the words "other valid and collectible insurance available to" White, which the trial court adopted, does violence to well-known rules of construction of insurance contracts. This is not so. Other courts have been called upon to say what the term "valid and collectible" means and have said in *American Lumbermen's etc. v. Lumber Mutual Casualty Company,* 295 N. Y. Supp. 321:

> "We interpret the words 'total amount of collectible and valid insurance' to mean insurance which is capable of protecting the insured. It merely excludes invalid or illegal insurance (such as insurance which is voidable for misrepresentation) and uncollectible insurance (such as insurance of an insolvent company) from the computation of total insurance for the purposes of apportionment. These words were so construed by this court in Balzer v. Glove Indemnity Co., 206 N. Y. S. 777, in Lamb v. Belt Casualty Co., 3 C. A. (2) 624, 40 Pac. (2) 311, and the same interpretation was adopted by the California court."

The general rules of construction discussed on pages 14 to 15 of appellant's brief are valid enough, but the word "collectible," both from a standpoint of common sense and from the standpoint of authority just cited cannot mean that an insured (in this case, White), can make uncollectible by his own wrongful act that which

he could have collected had he co-operated with Home and then come to Standard and say,

> "The other insurance which was available to me has become uncollectible because I chose not to co-operate with the other insurer. Therefore may I please ask you now to pay the judgment recovered against me, which the other insurer, who was under obligation to me, need not pay because I failed to co-operate with him."

In other words, can even the most liberal construction of an insurance policy in favor of an assured be carried so far as to permit him to say the words "collectible insurance available" give him the right and option to make that which was available when the accident happened, unavailable by his own act, leave it up to his own whim?

We strongly urge that to argue this constitutes a "reduction *ad absurdum*" of the rules of construction and that, therefore, the suggestion of Judge O'Connor in a memorandum which appellant quotes as the only authority should not and cannot, in justice and logic, be followed. It is submitted the conclusion reached by the Honorable James M. Carter is the only logical and reasonable and just one that the facts will support. If White chose to break Home's policy then he personally became liable up to a sum equal to the limits of insurance afforded him by the policy of Home, which far exceeded the judgment stipulated against him and for which this action is brought.

V.

The Appeal of North Umberland Was Not Filed in Time.

We have answered the appeal of North Umberland on the merits because we do not wish to appear in the least as avoiding the issue by making a technical argument.

Having done so, however, we feel it is our duty to call the Court's attention to the proceedings subsequent to the entry of judgment in connection with the extension of time to file the appeal. We entertain serious doubts that the appeal was taken in proper time and would feel remiss in our duty unless this point was called to the court's attention.

As appears from the summary of facts, the Notice of Appeal was not filed until an *ex parte* order was made on March 20 extending the time for the filing of such notice. It was based on an affidavit which Standard had no opportunity to contradict or into the truth of which it could not then inquire. Let us hasten to add that we do not insinuate at all that Mr. Armstrong's affidavit was not filed in good faith, but against his statement that he did not receive notice of entry stands the record of the docket that such notice was sent to him. The issue of fact thus created, we submit, should not have been resolved *ex parte* at a time when the original thirty days for filing the notice of appeal had long since expired.

We submit that the rules of civil procedure provide for *a motion* (see Rule 6(b)(2)), when the relief from the default or excusable neglect is sought after the expiration

of the time in which the act should have been originally performed. Had an application for extension of time been made before the expiration of the original thirty days, a "request" therefor under Rule 6(b)(1) would have been sufficient, but since it was made after the expiration of the original time, the only way in which relief could be obtained was *"upon motion"* as the rule expressly states. Where a motion is required a notice of such motion must likewise be given. Of course, the record clearly shows that no such notice was given. We have searched the Rules of Procedure and their interpretation but have been unable to find a case in which this issue is squarely decided. But we submit that an order based on an *ex parte* application is not sufficient to extend the time of appeal for any reason, where such application is made *after* the original 30 days for filing the notice of appeal have expired.

Conclusion.

In conclusion, therefore, we respectfully urge:

A. That this Honorable Court examine the question whether under Rule 6(b) an *ex parte* application and order to extend the time to appeal was sufficient, and determine that this appeal should be dismissed for lack of jurisdiction.

B. That in the event this Honorable Court should decide the foregoing question in the negative, holding that this appeal was instituted in time, it affirm the judgment of the District Court holding that there was "other valid

and collectible insurance available" to White; that since he made this insurance unavoidable by his own act, and since North Umberland has no greater rights than he, North Umberland was correctly and properly relegated to a position where it could collect only from White, and not from this appellee.

Respectfully submitted,

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